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Supreme Court, U.S.
FILED

03 507 OCT 1 - 2003

No. 03-

IN THE

Supreme Court of the United States

FAX.COM, INC.,

Petitioner,

v.

STATE OF MISSOURI EX REL. NIXON,
ATTORNEY GENERAL, *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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89 pp

QUESTION PRESENTED

Does the federal Telephone Consumer Protection Act's ban of all unsolicited fax advertising violate the First Amendment?

PARTIES TO THE PROCEEDING

The petitioner is Fax.com, Inc. The respondents are the State of Missouri, *ex rel.* Jeremiah W. (Jay) Nixon, Attorney General, and the United States of America.

RULE 29.6 STATEMENT

Fax.com, Inc. does not have a parent company, nor does any publicly held company own 10% or more of Fax.com Inc.'s stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

I. The Telephone Consumer Protection Act 3

II. Case History 4

REASONS FOR GRANTING THE WRIT 6

I. The Eighth Circuit's Decision Is Inconsistent With This Court's Precedents And Contributes To Confusion Among The Lower Courts 7

A. The Eighth Circuit's Decision Conflicts With *Discovery Network* And Other Decisions Teaching That Restrictions On Commercial Speech May Not Draw Distinctions Unrelated To The Government's Asserted Interest 8

B. The Decision Of The Eighth Circuit Conflicts With This Court's Decision In *Western States* 12

1. The Eighth Circuit's Failure To Consider Numerous And Obvious Less Restrictive Alternatives Conflicts With *Western States* 12

TABLE OF CONTENTS
(continued)

Page

2. Numerous And Obvious Less Burdensome Alternatives Exist To Promote The Government's Interest. 13

C. The Eighth Circuit's Decision Is Inconsistent With This Court's Decisions Rejecting Prior-Consent-To-Speak Laws..... 16

D. The Decision Below Contributes To Confusion In The Lower Courts..... 19

II. The Court Should Clarify The Applicability And Scope Of This Court's Decision In *Central Hudson* 22

A. The *Central Hudson* Standard Is The Subject Of Recurring Criticism..... 22

B. Strict Scrutiny Should At Least Apply To Content-Based Restrictions Justified Only By Concerns Regarding The Means Of Distribution, A Question Left Open By *Discovery Network*..... 23

III. The Constitutionality of the TCPA Is Of Great Public Importance And Deserves Review..... 26

A. The TCPA's Fax Restrictions Have Generated A Wave Of Litigation..... 26

B. Today's Issue Will Evade Future Review..... 28

C. Fax Advertisers And Their Customers Are Not The Only Parties That Would Benefit From The Court Addressing Today's Question..... 29

CONCLUSION..... 30

TABLE OF AUTHORITIES

Page

CASES

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996).....16, 18, 22, 23
Anabell's Ice Cream Corp. v. Glocester,
925 F. Supp. 920 (D.R.I. 1996) 20
Ass'n of Nat'l Advertisers, Inc. v. Lungren,
44 F.3d 726 (9th Cir. 1994).....21
Bad Frog Brewery, Inc. v. NY State Liquor Auth.,
134 F.3d 87 (2d Cir. 1998) 20, 21
Bolger v. Youngs Drug Prod. Co.,
463 U.S. 60 (1983).....11, 17, 18
Carey v. Brown, 447 U.S. 455 (1980).....12
Central Hudson Gas & Elec. Corp. v. Pub. Serv.
Comm'n, 447 U.S. 557 (1980).....*passim*
Cincinnati v. Discovery Network,
507 U.S. 410 (1993).....*passim*
City of Ladue v. Gilleo, 512 U.S. 43 (1994).....18
Cohen v. California, 403 U.S. 15 (1971).....17
Destination Ventures, Ltd. v. FCC,
46 F.3d 54 (9th Cir. 1995).....20
Edenfield v. Fane, 507 U.S. 761 (1993).....11, 15
Frisby v. Schultz, 487 U.S. 474 (1988) 11
Greater New Orleans Broad. Assoc. v.
United States, 527 U.S. 173 (1999).....8, 22
Holding v. Anchorage, 63 P.3d 248 (Alaska 2003) 21
In re Hooters of Augusta, No. 1-01-6K-67611
(Bankr. N.D. Ga filed June 8, 2001).....27
Kirsch v. Fax.com. Inc., No. CV810516
(Santa Clara Cty., Cal. Super. filed Aug. 22, 2002)...28

TABLE OF AUTHORITIES
(continued)

Page

Lamont v. Postmaster Gen.,
381 U.S. 301 (1965).....17

Lavey v. City of Two Rivers,
171 F.3d 1110 (7th Cir. 1999).....21

Lawson v. Reeves, 537 So. 2d 15 (Ala. 1988).....28

Linmark Assocs., Inc. v. Township of Willingboro,
431 U.S. 85 (1977).....19

Lipscomb v. Wal-Mart Stores, Inc., No. 01-CP-20-63
(Fairfield County C.P. Ct. S.C. filed Oct. 8, 2001)....26

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001).....8, 19, 23

Lysaght v. New Jersey,
837 F. Supp. 646 (D.N.J. 1993).....20

Mainstream Marketing Services, Inc. v. F.T.C.,
No. 03 N 0184 (D. Colo. Sept. 25, 2003).....22

MD II Entm't, Inc. v. Dallas,
28 F.3d 492 (5th Cir. 1994).....21

Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).....21

Moser v. FCC, 826 F. Supp. 360 (D. Or. 1993),
rev'd on other grounds 46 F.3d 970 (9th Cir. 1995)..20

Nicholson v. Hooters of Augusta, Inc., No.
95-RCCV-616 (Ga. Super. Ct. Apr. 25, 2001)....27, 29

Outdoor Sys., Inc. v. Mesa,
997 F.2d 604 (9th Cir. 1993).....21

Pearson v. Edgar, 153 F.3d 397 (7th Cir. 1998).....19, 20

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 21, 22, 25

Rappa v. New Castle Cty., 18 F.3d 1043 (3d Cir. 1994)....21

Revo v. Disciplinary Bd., 106 F.3d 929 (10th Cir. 1997)...21

Rowan v. United States Post Office Dep't,
397 U.S. 728 (1970).....15, 17

TABLE OF AUTHORITIES
(continued)

Page

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995).....8, 13, 16, 23

Rudgayzer & Gratt v. Enine, Inc., No. 32527/01, (N.Y.C. Civil Court Sept. 30, 2002).....27

Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988).....18

Simon & Schuster v. N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991).....25

Thompson v. Western States Med. Ctr.,
535 U.S. 357 (2002).....*passim*

U.S. West, Inc. v. FCC,
182 F.3d 1224 (10th Cir. 1999).....13

United States v. Eichman, 496 U.S. 310 (1990).....11

Valley Broad. Co. v. United States,
107 F.3d 1328 (9th Cir. 1997).....21

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council Inc., 425 U.S. 748 (1976).....7, 24

STATUTES

28 U.S.C. § 1254(1).....1

Telephone Consumer Protection Act,
47 U.S.C. § 227.....1, 2
47 U.S.C. § 227(a)(3).....16
47 U.S.C. § 227(a)(4).....1, 3, 6, 18
47 U.S.C. § 227(b)(1).....1, 3, 9
47 U.S.C. § 227(b)(3).....3, 28
47 U.S.C. § 227(c)(3).....14
47 U.S.C. § 227(c)(5).....13, 16
47 U.S.C. § 227(f).....3

47 U.S.C. § 503(b)(2).....3

TABLE OF AUTHORITIES
(continued)

Page

Ala. Code § 8-19C-3 (2002) 14
Alaska Stat. Ann. § 45.50.475 (2001) 14
Ark. Code Ann. § 4-99-404 (2001) 14
Cal. Bus. & Prof. Code § 17529.2 30
Cal. Bus. & Prof. Code § 17591 (2002), *updated by* 2002 Cal. Legis. Serv CH. 698 (S.B. 1560) (West) 14
Colo. Rev. Stat. § 6-1-702(b) (2002) 15
Colo. Rev. Stat. § 6-1-901 *et seq.* (2002) 14
Conn. Gen. Stat. Ann. § 42-288a (West 2002) 14
Fla. Stat. Ann. § 501.059 (West 2002) 14
Ga. Code Ann. § 46-5-27 (2002) 14
Idaho Code § 48-1003A (Michie 2002) 14
Ind. Code Ann. § 24-4.7 (2002) 14
2002 Kan. Sess. Laws 179 14
Ky. Rev. Stat. Ann. § 367.46955(15), *amended by* 2002 Kentucky Laws Ch. 21 (H.B. 47) ..14
La. Rev. Stat. Ann. § 45:844.13 (West 2002) 14
Minn. Stat. § 325E.395 (2001) 15
2002 Minn. Chapter Laws 367 14
Mo. Rev. Stat. § 407.1098 (2001) 14
N.Y. Gen. Bus. Law § 399-z (McKinney 2002) 14
N.Y. Gen. Bus. Law § 396-aa(1)(2002) 16
N.D. Cent. Code § 51-07-23 (2001) 16
Or. Rev. Stat. § 646.574 (2001) 14
Or. Rev. Stat. § 646.872 (2001) 15
R.I. Gen. Laws § 6-47-1 (2001) 15
S.C. Code Ann. §15-75-50 13
S.C. Code Ann. § 15-75-51 13

TABLE OF AUTHORITIES
(continued)

Page

Tenn. Code Ann. § 47-18-2501(a) (2001).....15
Tenn. Code Ann. § 65-4-405 (2001).....14
Tex. Bus. & Com. Code Ann. § 43.101 (2001).....14
Va. Code § 18.2-152.3:1 30
2002 Vt. Laws 120.....14
Wis. Stat. § 100.52 (2001).....14
Wis. Stat. § 134.72 (2001).....16
Wyo. Stat. Ann. § 40-12-302 (Michie 2002) 14

RULES AND REGULATIONS

Sup. Ct. R. 10.....2, 6, 28
15 FCC Rcd 18221 (Sept. 14, 2000).....3
16 C.F.R. § 310.4.....14
16 C.F.R. § 310.8.....14
47 C.F.R. § 64.1200.....14

MISCELLANEOUS

Anti-Spam Act of 2003 (H.R. 2515).....29
Ban on Deceptive Unsolicited Bulk
Electronic Mail Act of 2003 (S. 1052) 29
CAN-SPAM Act of 2003 (S. 877).....29
Computer Owner's Bill of Rights (S. 563) 29
Criminal Spam Act of 2003 (S. 1293).....30
REDUCE SPAM Act of 2003 (H.R. 1993).....30
Reduction in Distribution
of Spam Act of 2003 (H.R. 2214).....30
Stop Pornography and Abusive Marketing Act (S. 1231) .30

TABLE OF AUTHORITIES
(continued)

Page

Wireless Telephone Spam Protection Act (H.R. 122) 30
H.R. 1304, 102d Cong., 1st Sess. (1991).....15
H.R. 2184, 101st Cong., 1st Sess. (1989).....15
H.R. 2921, 101st Cong., 2d Sess. (1990).....15
H.R. Rep. No. 102-317 (1991).....10
FCC Report and Order, FCC-03-153 (July 3, 2003).....3, 19
Unsolicited Telephone Calls, 77 F.C.C.2d 1023 (1980)....17

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 323 F.3d 649, the opinion of the district court (Pet. App. 19a-42a) is reported at 196 F. Supp. 2d 920, and the decision of district court adopting *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), as the applicable standard (Pet. App. 43a.) is unreported.

JURISDICTION

On March 21, 2003, the court of appeals issued its decision on the merits in this case. On July 3, 2003, the court of appeals denied petitioner's motion for panel rehearing or rehearing *en banc*. *See* Pet. App. 1a. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law . . . abridging the freedom of speech."

The Telephone Consumer Protection Act of 1991, codified at 47 U.S.C. § 227, states in relevant part:

> "It shall be unlawful for any person . . . to use any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine." § 227(b)(1)(C).
>
> "The term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." § 227(a)(4).

STATEMENT

In recent years, Congress and numerous State legislatures have enacted diverse and increasingly severe limitations on emerging communication technologies, including e-mail, faxing, and wireless communication. Many of these laws limit unsolicited advertisements. In this case, however, the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), and its blanket restriction of unsolicited fax advertising goes one step further. The TCPA prohibits the transmission of *any* fax advertisement without the prior express invitation or permission of the recipient. This prior consent burden is so onerous that the district court, in ruling that the TCPA violated the First Amendment, regarded the TCPA "for all practical purposes" as "a complete ban on facsimile advertising." Pet. App. 41a n.26.

Though the Eighth Circuit reversed the district court, its decision "conflicts with relevant decisions of the Court," Sup. Ct. R. 10(c), and adds to the confusion among the lower courts. To uphold the TCPA's content-based restriction, the court below repeatedly distinguished "cases in which the Supreme Court recently struck down restrictions on commercial speech." Pet App. 16a. Because the outcome of this case presages the fate of commercial speech across an array of emerging communication technologies, and because the decision below may be a harbinger for Congress and various state legislatures to extend the TCPA's crippling speech restrictions to those technologies, this case cries out for review.

And that review cannot come soon enough. While the actual cost of receiving a fax may only be a half-cent per page, Pet. App. at 32a n.18, the TCPA's disproportionate damage awards have spawned a new class action cottage industry. *See infra.* at 26. A single fax, if sent to enough people, can threaten a multi-million dollar judgment and force a business into bankruptcy. *Id.* These businesses have little choice but to pull the plug on fax advertising, effectively silencing an entire means of commercial speech.

I. The Telephone Consumer Protection Act.

In 1991, Congress passed the TCPA in response to public concern over the growing number of unwanted telephone solicitations. The Act addressed these concerns by prohibiting certain telemarketing practices and authorizing the regulation of such practices by the FCC.

With little fanfare or inquiry, Congress also imposed restrictions on fax advertising. Under the TCPA, it is unlawful for any person "to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine...." *See* 47 U.S.C. § 227(b)(1)(C). The TCPA defines an "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." *See* 47 U.S.C. § 227(a)(4). Absent that "permission," transmitting any commercial fax advertisement violates the Act. *Id.* And unlike the rules for telephone solicitations, there is no "first fax" exception, nor is there an exemption for contacting parties with an existing business relationship. *See* FCC Report and Order, FCC-03-153 (July 3, 2003) at 113, ¶ 189.

The TCPA provides several enforcement mechanisms. As demonstrated by this action, State attorneys general may bring lawsuits in federal court on behalf of the State's residents. *See* 47 U.S.C. § 227(f)(1). In addition, a person may bring a TCPA action in state court. Such actions, whether brought by a State attorney general or by an individual, may seek both injunctive relief and a $500 award for each unsolicited fax advertisement received. *See* 47 U.S.C. §§ 227(b)(3) and (f). If the defendant "willfully or knowingly" violated the Act, the award may increase to $1,500 for a single violation. *See id.* Finally, the FCC may order forfeitures in the maximum amount of $11,000 *per violation* of the Act. *See* 47 U.S.C. § 503(b)(2)(C); 15 FCC Rcd 18221 (Sept. 14, 2000).

II. Case History.

The State of Missouri brought this suit against Fax.com in August 2000, alleging that Fax.com violated the TCPA by faxing unsolicited advertisements to recipients in Missouri.[1] Missouri sought $1,500 in damages per fax and an injunction prohibiting future unsolicited fax advertisements. Fax.com moved to dismiss the suit, arguing that the TCPA's fax ban violated the First Amendment.[2] The United States intervened and defended the fax ban in a two-day evidentiary hearing held in July 2001. After considering the evidence and post-hearing briefs, the district court on March 13, 2002, entered judgment in favor of Fax.com, ruling that the TCPA's ban on unsolicited fax advertisements violates the First Amendment. *See* Pet. App. 19a.

Although petitioner maintained that strict scrutiny should apply in this case, the district court rejected that argument in favor of the four-part test of *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Pet. App. 43a. Applying that test, the district court found that the government had not satisfied its burden on *any* of the *Central Hudson* requirements. To start, the government's claim of a substantial interest in preventing truthful fax advertisers from shifting costs to recipients or tying up recipients' fax machines, was not supported by the record. *Id.* at 32-34a . Nor did the record show that the TCPA's ban on fax advertising would "directly advance[]" the government's interest when it ignored so much of the harm:

> The TCPA does not ban all unsolicited faxes but rather only advertisements. Therefore, recipients can still bear the costs of printing others' messages, even if they strongly oppose the messages' content.

---

[1] This suit was consolidated with an earlier suit brought by Missouri against American Blast Fax, Inc., which has since gone out of business.

[2] The motion was later converted into a motion for summary judgment.

Pet App. 37a. Thus, "[t]here is no rationality behind the government's distinction between unsolicited advertisements and other unsolicited faxes." *Id.* at 40a.

Moreover, the district court identified "a variety of alternatives, including a national 'no-fax' database similar to those being utilized for telephone solicitations" that "would promote the government's interest, and yet be less intrusive to First Amendment rights." *Id.* at 39a. Indeed, "[m]any states have looked at this problem and found less restrictive means than a complete ban on unsolicited fax advertisements." *Id.* Thus, the government failed "to show that the regulations are no more extensive than is necessary to serve the government's interests." *Id.* at 41a.

Despite this record, the Eighth Circuit reversed and upheld the TCPA's fax advertising ban under *Central Hudson*. Although recognizing that the "[t]he harm associated with unsolicited fax advertisements is . . . not related to the content of the messages," the Eighth Circuit rejected the district court's conclusion that the Act impermissibly singled out commercial faxes. Pet. App. 17a. In doing so, the Eighth Circuit was obliged to distinguish "different characteristics" of "cases in which the Supreme Court has recently struck down restrictions on commercial speech." *Id.* at 16a (citing *Western States*, *Lorillard*, and *44 Liquormart*, *infra*.). The Eighth Circuit also dismissed numerous alternatives to the TCPA (such as a "first fax" exception, a "do not fax" list, or limits on the length and frequency of faxes), not by disputing whether these alternatives were less intrusive while still serving the government's interest, but instead by reiterating that intermediate scrutiny does not require the least restrictive means. Pet. App. 14-15a. As a result, the Eighth Circuit acknowledged that "the effect of the TCPA will be that some consumers will not receive unsolicited advertisements they might have appreciated." *Id.* at 15a.

The Eighth Circuit denied rehearing *en banc* and this petition followed.

REASONS FOR GRANTING THE WRIT

Because the Eighth Circuit's decision conflicts with the Court's precedents, today's important question of federal law warrants review. *See* Sup. Ct. R. 10(c). If left undisturbed, the decision below will be a key authority for the many lower courts and legislatures analyzing the ever-expanding government restrictions on technology-driven speech.

Unfortunately, the Eighth Circuit's decision strays far from the path paved by this Court. By giving different treatment to commercial and noncommercial faxes – despite their identical impact on cost-shifting and a recipient's fax line – the decision conflicts with *Cincinnati v. Discovery Network*, 507 U.S. 410, 424 (1993), and other decisions teaching that restrictions targeting commercial speech must be reasonably related to the government's interests. By brushing aside numerous alternatives that would address the government's concerns without imposing what the trial court described as a "complete ban" on fax advertising, the decision conflicts with *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002), and other decisions teaching that "if the Government could achieve its interests in a manner that . . . restricts less speech, the Government must do so." And by failing to recognize the First Amendment problems inherent in requiring the "prior express invitation or permission" from the fax recipient, *see* 47 U.S.C. § 227(a)(4), the decision conflicts with this Court's prior-consent-to-speak cases, *infra* at 17, which make clear that the Government cannot require a recipient to make an affirmative request for speech.

The decision below also adds to the growing confusion among the lower courts on both the proper treatment of arguably underinclusive commercial speech restrictions and the analysis of less restrictive alternatives. If left undisturbed, the Eighth Circuit's decision will sow further uncertainty among lower courts, and it will reap a bitter harvest for national commerce dependant upon the "indispensable" and "free flow of commercial information."

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748, 765 (1976).

The Court should also grant review to address the continuing applicability and scope of *Central Hudson*. As several members of this Court have noted in different contexts, the balancing test set forth in that case provides insufficient protection for truthful, non-misleading commercial speech. Indeed, in *Discovery Network*, this Court expressly reserved the question of whether *Central Hudson* or strict scrutiny should apply to a content-based commercial speech restriction that, like the TCPA's fax restrictions, is justified solely by concerns about the medium of communication. This case provides an excellent opportunity to resolve that open question.

I. The Eighth Circuit's Decision Is Inconsistent With This Court's Precedents And Contributes To Confusion Among The Lower Courts.

In analyzing the constitutionality of the TCPA's fax restrictions, both lower courts applied the framework of *Central Hudson,* 447 U.S. at 566, but with very different results. Under *Central Hudson*, where, like here, the expression concerns lawful activity and is not misleading, a speech restriction is permitted only if the asserted government interest is substantial; the regulation "directly advances" the interest; and the regulation is "not more extensive than necessary to serve that interest." 447 U.S. at 591. The district court concluded that none of these standards were met. The Court of Appeals took precisely the opposite view, and held that each of the requirements were satisfied. That conclusion conflicts with this Court's precedents and contributes to confusion among the lower courts in the analysis of commercial speech restrictions.

A. The Eighth Circuit's Decision Conflicts With *Discovery Network* And Other Decisions Teaching That Restrictions On Commercial Speech May Not Draw Distinctions Unrelated To The Government's Asserted Interest.

Central Hudson's third and fourth prongs, taken together, "basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995) (quotation omitted). To sustain a speech restriction, there must be a "reasonable fit" between the government's ends and the means chosen to address them. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001).

Numerous decisions of this Court make clear that a speech restriction will not satisfy these requirements if it draws distinctions in a manner that has no reasonable relationship to the government's claimed interest. In *Rubin*, the Court concluded that given the Government's claimed interest in preventing "strength wars," the challenged statute's differing approaches to the display of alcohol content in beer labels, beer advertising, and wine and spirit labels made "no rational sense." *Id.* Similarly, in *Greater New Orleans Broadcasting Assoc. v. United States*, 527 U.S. 173 (1999), the Court struck down an FCC regulation that prohibited radio and television advertising of commercial casino gambling, but not tribal or Government-owned casinos. The Court concluded that "the Government present[ed] no sound reason why such lines bear any meaningful relationship" to the Government's claimed interest in alleviating the social costs of casino gambling. *Id.* at 193.

The same principles underlie *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993). In *Discovery Network*, Cincinnati cited safety and aesthetic concerns in banning distribution of commercial publications from newsracks, but imposed no similar ban on "regular" newspapers. This Court struck the ordinance as lacking a reasonable fit with the

stated interests, since noncommercial newsracks posed the same concerns but were not banned.

Discovery Network stands for the proposition that the fact that speech is "commercial" in nature cannot be used as the excuse to restrict it where the speech's commercial nature is unrelated to the problem sought to be solved. The Court explained that the Cincinnati ordinance made the mistake of "attach[ing] more importance to the distinction between commercial and noncommercial speech than [the] cases warrant and seriously underestimat[ing] the value of commercial speech." *Id.* at 419. The distinction made between commercial and noncommercial newsracks bore "no relationship *whatsoever* to the particular interests that the city has asserted," 507 U.S. at 424, and the required "reasonable fit" was lacking. *Id.*

Contrary to the decision below, *Discovery Network* controls this case. The interests asserted by the government, protecting recipients from the costs of receiving unsolicited faxes and from having their fax lines tied up, cannot save this statute. As in *Discovery Network*, these interests involve only the means of distribution, *id.* at 426 n.21, not any harm related to commercial content, *id.* at 426. The government's stated interests thus might support restricting only the longest, and hence most costly, faxes, or only faxes sent during the busiest times of day. But they bear "no relationship *whatsoever*," to the TCPA's content-based distinction.

Critical to this analysis, the Act does not prohibit all unsolicited faxes, just those containing "an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). Unsolicited chain letters, charitable solicitations, surveys, prank faxes and, of course, campaign solicitations, may proceed freely. Thus, as the district court recognized, "there is no rationality behind the government's distinction between unsolicited advertisements and other unsolicited faxes." Pet. App. 40a.

The Eighth Circuit, to its credit, also acknowledged that the stated governmental interests related only to the means of

distribution, explaining that "Congress was not concerned with the effect of the content of the advertisements, but rather with the effect of communicating," and, further, that "[t]he harm associated with unsolicited fax advertisements is . . . not related to the content of the messages." Pet. App. 40a. Under *Discovery Network*, this should have invalidated the TCPA's artificial distinction between commercial and noncommercial faxes.

Instead of applying the clear teaching of *Discovery Network*, however, the Eighth Circuit sought to distinguish it. In doing so, the appeals court justified the TCPA's artificial distinction between commercial and noncommercial faxes by resorting to legislative history regarding *telemarketing*–not fax advertising, to fill gaps in its *Central Hudson* analysis:

> When Congress enacted the TCPA it found that 'non-commercial *calls* . . . are less intrusive to consumers because they are more expected.' H.R. Rep. No. 102-317, at 16 (1991). There is no reason to doubt that Congress also believed for the same reason that noncommercial faxes did not present the same problem as commercial faxes and therefore distinguished between them.

Pet. App. at 10a. After using one medium, telemarketing, to justify the regulation of another, faxing, the Eighth Circuit entirely ignored the less speech restrictive alternatives that govern telemarketing. Moreover, if non-commercial faxes "are more expected," making those faxes the primary cause of cost-shifting, then the entire rationale for restricting only commercial speech unravels. *Discovery Network*, 507 U.S. at 427 (criticizing "incremental support" for restriction).

'In all events, there are many reasons to doubt that Congress's conclusion that noncommercial *calls* are "more expected," and thus less intrusive, has any application to faxes. Faxes, unlike calls, are received primarily by businesses, where commercial communication is the norm. And as simple pieces of paper printed out on a machine,

faxes are more uniform than calls – one unwanted fax of a given length is no more "intrusive" than another. By disregarding these differences, and simply equating faxes with calls, the Eighth Circuit relied on "speculation and conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

Even apart from its factual accuracy, the court of appeals' discussion of the relative "intrusiveness" of commercial versus noncommercial faxes is simply inapt. This supposed "intrusion" has nothing to do with cost-shifting. Instead, the court of appeals' "intrusiveness" analysis relies on privacy-based interests appropriate to the residential setting where most phone calls are answered, not to the business setting where most faxes are received. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (noting "the unique nature of the home" in assessing privacy interests).

Without these justifications, what remains is a troubling attempt to justify a content-based speech restriction by citing the perceived unpopularity of the restricted speech. Pet. App. at 10a ("TCPA's distinction between commercial and noncommercial fax advertising is relevant to the goal of reducing the costs and interference associated with *unwanted* faxes.") Plainly, a content-based speech restriction founded on the Government's view of what type of speech the majority "wants," cannot be sustained. Indeed, "any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment." *United States v. Eichman*, 496 U.S. 310, 318 (1990), and that principle fully applies to commercial speech. *Bolger v. Youngs Drug Prod. Co.*, 463 U.S. 60, 71-72 (1983). The lower court's attempt to distinguish *Discovery Network* via the "unwantedness" of commercial faxes is a reincarnation of *Discovery Network*'s rejected argument that commercial speech can be treated differently because it has low value.[3]

[3] The Eighth Circuit would surely not proffer its "unwantedness" rationale in the context of noncommercial speech – say, justifying a restriction of pro-labor faxes but not pro-management faxes on the

In the end, the appeals court failed to heed the teaching of *Discovery Network*, which makes clear that the government may not take a "limited" approach to a general problem by singling out commercial speech without a reason. 507 U.S. at 418-19 (goal of limiting the number of newsracks was "insufficient justification" for restricting commercial newsracks that were "no more harmful than the permitted newsracks"). As a result, the Eighth Circuit permitted precisely the sort of logically unfounded targeting of commercial speech that *Discovery Network* forbade.

B. The Decision Of The Eighth Circuit Conflicts With This Court's Decision In *Western States*.

1. The Eighth Circuit's Failure To Consider Numerous And Obvious Less Restrictive Alternatives Conflicts With *Western States*.

In its most recent decision on commercial speech, this Court reaffirmed *Central Hudson's* demand for narrow tailoring. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002). There, the Court explained, "we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Id.* at 371. The Court was particularly critical that there was no "explanation of why the Government believed forbidding advertising was a necessary as opposed to merely convenient means of achieving its interest." *Id.* at 373.

The TCPA suffers from the same defect. There is no evidence in the legislative history or elsewhere that Congress, in enacting the TCPA's ban on fax advertising, considered the "numerous and obvious less-burdensome alternatives," *Discovery Network*, 507 U.S. at 418. A "do not fax" list or a requirement that the fax recipient first

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ground that the former are generally more "unwanted" by the fax-receiving audience. *Cf. Carey v. Brown*, 447 U.S. 455, 465 (1980).

object before filing suit "could advance the Government's asserted interest[s] in a manner less intrusive to . . . First Amendment rights. " *Rubin*, 514 U.S. at 491.

Equally important, the Eighth Circuit has admitted that the TCPA will block consumers from receiving speech "they might have appreciated," Pet. App. 15a, the very result abjured by *Western States*. 535 U.S. at 377 ("The fact that the FDAMA would prohibit such seemingly useful speech even though doing so does not appear to further any asserted governmental objective confirms our belief that the prohibition is unconstitutional."). "If the First Amendment means anything, it means that regulating speech must be a last – not first – resort. Yet here it seems to have been the first strategy the government thought to try." *Id.* at 373.

2. Numerous And Obvious Less Burdensome Alternatives Exist To Promote The Government's Interest.

The less intrusive alternatives are not only obvious, they are identified by the TCPA itself. Unlike its treatment of faxes, the TCPA's regulation of telemarketing does not require a phone call recipient's prior consent. Instead, the TCPA prohibits phone solicitations only where the recipient has previously objected. 47 U.S.C. § 227(c)(5) (authorizing private action for person who receives "more than one telephone call" from the same advertiser after requesting no further calls). This regulatory scheme has governed telemarketing since 1991.

A similar "first fax" exception is just as feasible and is currently employed by South Carolina. S.C. Code Ann. §§ 15-75-50 and 15-75-51. Neither the TCPA nor its legislative history explain why a first fax exception was not adopted in lieu of the Act's heavy-handed prohibition. Under a first fax exception, unlike the chosen prior consent scheme, customers who admittedly "might have appreciated" receiving a fax, Pet. App. 15a, would still be able to do so. These same customers, however, cannot opt out of the TCPA. *See U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224, 1238-

39 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000) (striking a telecommunication regulation because the government failed to consider an "opt-out strategy" as a less restrictive alternative).

The TCPA also identifies a second less restrictive alternative – the creation of a do not call list. *See* 47 U.S.C. § 227(c)(3) (authorizing a do not call database for telephone solicitation). Already, there has been widespread approval and adoption of "do not call" lists – databases of telephone numbers of people who do not wish to receive telemarketing calls. At least 22 states currently have, or are now establishing, "no-call" lists.[4] On June 26, 2003, the FCC revised its rules implementing the TCPA and established, in coordination with the Federal Trade Commission, a national "do not call" registry. 47 C.F.R. § 64.1200; 16 C.F.R. §§ 310.4 and 310.8. The national list is accepting registrants, and is scheduled to become effective on October 1, 2003.

These "no call" lists have been extremely well received. The national "no call" registry, for example, already includes over 48 million phone numbers. *See Call Center Struggles In Face Of Do Not Call Rules*, New York Times, Sept. 22, 2003. The cost to maintain the list is recovered from telemarketers, who pay to acquire the list. *See* 16 C.F.R. § 310.8 ($25 per area code per year). Fax numbers could easily be added to the national "no call" list.

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[4] Ala. Code § 8-19C-3 (2002); Alaska Stat. Ann. § 45.50.475 (2001); Ark. Code Ann. § 4-99-404 (2001); Cal. Bus. & Prof. Code §17591 (2002), *updated by* 2002 Cal. Legis. Serv. CH. 698 (S.B. 1560)(West); Colo. Rev. Stat. § 6-1-901 *et seq.* (2002); Conn. Gen. Stat. Ann. § 42-288a (West 2002); Fla. Stat. Ann. § 501.059 (West 2002); Ga. Code Ann. § 46-5-27 (2002); Idaho Code §48-1003A (Michie 2002); Ind. Code Ann. § 24-4.7 (2002); 2002 Kan. Sess. Laws 179; Ky. Rev. Stat. Ann. § 367.46955(15) *amended by* 2002 Kentucky Laws Ch. 21 (H.B. 47); La. Rev. Stat. Ann. § 45:844.13 (West 2002); 2002 Minn. Chapter Laws 367; Mo. Rev. Stat. § 407.1098 (2001); N.Y. Gen. Bus. Law § 399-z (McKinney 2002); Or. Rev. Stat. § 646.574 (2001); Tenn. Code Ann. § 65-4-405 (2001); Tex. Bus. & Com. Code Ann. § 43.101 (2001); 2002 Vt. Laws 120; Wis. Stat. § 100.52 (2001); Wyo. Stat. Ann. § 40-12-302 (Michie 2002).

Like the "do not call" lists for telemarketing, a "do not fax" list is a less restrictive option that is readily available. *See* Pet. App. 39a (noting that a do not fax list "would promote the government's interest, and yet be less intrusive to First Amendment rights"). In a variation of this practice, several states require fax advertisers to maintain their own "no-fax" lists, and to place on unsolicited fax advertisements a telephone number or address where recipients can indicate their desire not to receive such faxes.[5] Congress was well aware of this alternative for fax advertising and considered its adoption in various forms in three house bills preceding the TCPA.[6]

A "no-fax" list, unlike the TCPA, would allow interested recipients to keep receiving unsolicited faxes, while accommodating those who object to them. *See Edenfield*, 507 U.S. at 767 ("the general rule is that the speaker and the audience, not the government, assess the value of the information presented"); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970). Thus, a "no fax" list trusts individuals over the government to decide whether any particular speech is unwanted and restricts less speech.[7]

Another less intrusive restriction already in practice would be to impose content neutral limits on the length, number or frequency of unsolicited faxes. *See Discovery Network*, 507 U.S. at 417 (city's failure to regulate the "size, shape, appearance or number" of newsracks indicated that it had not "'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition"). In New York, North Dakota, and Wisconsin, for example,

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[5] Colo. Rev. Stat. § 6-1-702(b)(2002); Minn. Stat. § 325E.395 (2001); Or. Rev. Stat. § 646.872 (2001); R.I. Gen. Laws § 6-47-1 (2001); Tenn. Code Ann. § 47-18-2501(a)(2001).

[6] *See* H.R. 2184, 101st Cong., 1st Sess. (1989); H.R. 2921, 101st Cong., 2d Sess. (1990); H.R. 1304, 102d Cong., 1st Sess. (1991).

[7] Because the federal do not call list only applies to commercial calls, it may still run afoul of *Discovery Network*. *See Mainstream Marketing Services, Inc. v. F.T.C.*, No. 03 N 0184 (D. Colo. Sept. 25, 2003).

unsolicited faxes are subject to short page limits, and must be received during business hours between 9 a.m. and 6 p.m.[8]

Other less restrictive alternatives include exceptions for faxes to parties with existing business relationships and inadvertent faxes to wrong numbers – both of which are not prohibited for telemarketing, *see* 47 U.S.C. § 227(c)(5) and § 227(a)(3), but are needlessly prohibited for unsolicited fax advertising under the TCPA.

The decision of the Eighth Circuit did not dispute whether any of these alternatives would restrict less speech. Nor did it dispute whether any of these alternatives could also serve the government's interests to block unwanted cost-shifting. Instead, the Eighth Circuit fell back on the old saw that intermediate scrutiny does not require the "least restrictive means" to achieve the government's ends. Pet. App. 15a. But as this Court's more recent decisions make clear, the existence of alternatives is critical to the "reasonable fit" analysis. *See Rubin*, 514 U.S. at 491 (noting alternatives "could advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (finding non-speech restrictive alternatives "more likely to achieve the State's goal"). By glossing over these alternatives, the Eighth Circuit's application of the "reasonable fit" test is impossible to reconcile with this Court's mandate from *Western States* "that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." 535 U.S. at 371.

C. The Eighth Circuit's Decision Is Inconsistent With This Court's Decisions Rejecting Prior-Consent-To-Speak Laws.

While the Eighth Circuit acknowledged that "the effect of the TCPA will be that some consumers will not receive

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[8] N.Y. Gen. Bus. Law § 396-aa(1) (2002); N.D. Cent. Code § 51-07-23 (2001); Wis. Stat. § 134.72 (2001).

unsolicited advertisements they might have appreciated," it found the First Amendment satisfied by the fact that "[a]dvertisers may obtain consent for their faxes . . ." Pet. App. 15a. This conclusion cannot be squared with the decisions of this Court rejecting prior-consent-to-speak laws.

While the government may in some instances allow individuals to limit the speech they receive, *see Rowan*, 397 U.S. at 738, the government may not require prospective recipients to make an affirmative request for that speech. *See Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60, 69 n.18 (1983); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965). For example, in *Lamont*, the Court considered a provision that required addressees to complete a form if they wished to receive mail considered to be communist propaganda. The Court struck the Act, noting that "[t]he addressee carries an affirmative obligation which we do not think the government may impose on him." 381 U.S. at 307. Similarly, in *Bolger* the Court held unconstitutional a ban on mailing *unsolicited* advertisements for contraceptives, finding unpersuasive "the argument that individuals can still request that they be sent appellee's mailings." 463 U.S. at 69 n.18; *see also Unsolicited Telephone Calls*, 77 F.C.C.2d 1023, 1035 (1980) (FCC noting that "a complete ban on unsolicited calls or a prohibition on such calls to subscribers who have not affirmatively indicated a desire to receive them would probably be unlawful").

These decisions demonstrate that, at bottom, what the First Amendment guarantees is freedom of speech – not freedom to seek permission to speak, nor freedom to request that the receipt of speech be allowed. For those who do not wish to receive the speech, this Court has made clear that the recipients may "avert[] their eyes" and that the "short, though regular, journey from mail box to trash can. . . is an acceptable burden, at least so far as the Constitution is concerned." *Bolger*, 463 U.S. at 72; *see also Cohen v. California*, 403 U.S. 15, 21 (1971).

The Eighth Circuit, however, entirely ignored this line of cases, made no attempt to address *Lamont* or *Bolger*, despite Fax.com's reliance on them, and instead took the paternalistic position that "[i]t was not unreasonable for Congress to choose a system that protects those who would otherwise be forced to bear unwanted burdens over those who wish to send and receive unsolicited fax advertising." Pet. App. 15a. Yet, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart*, 517 U.S. at 503.[9]

That same paternalism in endemic to the statute. By requiring the recipient's "prior express invitation or permission," 47 U.S.C. § 227(a)(4), the TCPA prohibits a wide range of fax communications between willing senders and recipients. Indeed, the TCPA is so protective of those who may not desire faxes, that they are not trusted to make that decision themselves – as the government presumptively refuses for them, and for everyone. Individuals who find unsolicited faxes a valuable tool for gathering information about businesses with whom they were previously unacquainted have no recourse under the Act. They obviously cannot contact these as-yet-unknown businesses to give "express invitation or permission" for potential faxes.

Moreover, the TCPA is not saved simply because "[a]dvertisers remain free to publicize their products through any legal means." Pet. App. 17a. Not only are those legal means quickly disappearing, *see infra* at 26-30, it is well-established that an otherwise impermissible content-based restriction is not saved simply by noting the availability of other media. *See Discovery Network*, 507 U.S. at 427; *Bolger*, 463 U.S. at 68 n.18; *City of Ladue v. Gilleo*, 512

[9]This paternalism is particularly inexplicable give that fax advertising, unlike telemarketing, involves purely written communication that has a much lower risk of fraud or undue influence than a person-to-person communication. *See Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 475 (1988). If anything, it is easier to ignore a fax than hang up on a high pressure telemarketer – yet, the Act imposes a blanket ban on only faxes.

U.S. 43, 55 (1994). Faxes, as instantaneous communications on a sheet of paper, also offer unique benefits. If a business wants to send a coupon to prospective customers there is simply no means as quick and inexpensive as a fax. *See Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (rejecting commercial speech restriction where alternative methods of advertising are more expensive or less likely to reach potential customers); *cf. Lorillard*, 533 U.S. at 565 (finding onsite advertising ban unconstitutional where "alternative forms of advertisement, like newspapers, do not allow that retailer to propose an instant transaction in the way that onsite advertising does").

The presumption against speech embodied by the TCPA's fax provisions is only strengthened by recent regulations proffered by the FCC. Under the new regulations, scheduled to take effect on January 1, 2005, "an established business relationship . . . will no longer be sufficient to show that an individual or business has given their express permission to receive unsolicited facsimile advertisements." *See* FCC Report and Order, FCC-03-153 (July 3, 2003) at 113, ¶ 189. Instead, "the prior express invitation or permission of the recipient . . . must be in writing and include the recipient's signature." *Id.* at 111, ¶187. This prior consent regime is an anathema to free speech – supplanting the choice of uninterested recipients to avert their eyes with a one-size-fits-all anti-speech fiat.

D. The Decision Below Contributes To Confusion In The Lower Courts.

The decision below is inconsistent with lower court decisions taking a stronger view of *Discovery Network* in analyzing underinclusive content-based speech restrictions. The stricter approach is well illustrated by *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998), which was on remand from this Court for further consideration in light of *Discovery Network*. Recognizing that *Discovery Network* had changed the playing field, the Seventh Circuit held that "the distinction between real estate solicitation and other types of

solicitation [in an Illinois anti-solicitation statute] is not plausible absent evidence that real estate solicitation poses a particular threat to residential privacy." The *Pearson* court admitted that it had not been too concerned with this underinclusiveness before, but that after *Discovery Network*, "now we must be." *Id.* at 404.

Other courts adopting a strong approach to *Discovery Network* have, in decisions inconsistent with the decision in this case, struck down a variety of laws that target commercial speech for reasons unrelated to its commercial content. *See, e.g., Lysaght v. New Jersey*, 837 F. Supp. 646, 651-52 (D.N.J. 1993) (state law prohibiting prerecorded commercial, but not noncommercial, telephone messages); *Anabell's Ice Cream Corp. v. Glocester*, 925 F. Supp. 920 (D.R.I. 1996) (ordinance prohibiting use of electronic noisemaking devices by merchants but not others); *Moser v. FCC*, 826 F. Supp. 360, 366 (D. Or. 1993), *rev'd on other grounds*, 46 F.3d 970 (9th Cir. 1995) (TCPA provision requiring FCC to restrict commercial, but not noncommercial, artificial or prerecorded voice calls).

Courts adopting a more liberal view of *Discovery Network* have focused on whether a narrow formulation of the government's interest justifies the limited scope of challenged restrictions. For example, the Eighth Circuit decision here recharacterized the government's interest as "reducing the costs and interference associated with *unwanted* faxes." Pet. App. 10a. The Ninth Circuit took a similar approach in *Destination Ventures, Ltd. v. F.C.C.*, 46 F.3d 54, 56 (9th Cir. 1995), characterizing the government's goal as "to prevent the shifting of *advertising* costs." Not all courts take such a narrow view of the government's interest. The Second Circuit has rejected this approach, noting that if the interest is viewed so narrowly, "any regulation that makes any contribution to achieving a state objective would pass muster." *See Bad Frog Brewery, Inc. v. NY State Liquor Auth.*, 134 F.3d 87, 100 (2d Cir. 1998).

Lower courts' confusion regarding underinclusive commercial speech restrictions is exacerbated by uncertainty regarding the role of other decisions of this Court. For example, courts have noted confusion regarding the interplay of *Discovery Network* and the plurality decision in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981). *See, e.g., Lavey v. City of Two Rivers*, 171 F.3d 1110, 1115 n.16 (7th Cir. 1999) (noting uncertainty); *Outdoor Systems, Inc. v. Mesa*, 997 F.2d 604 (9th Cir. 1993) (following *Metromedia*, although court was "somewhat uneasy" regarding standard in light of *Discovery Network*); *Rappa v. New Castle Cty.*, 18 F.3d 1043, 1065 n.35 (3rd Cir. 1994) (noting "significant tension" between two decisions). Similarly, several courts have exhibited uncertainty regarding the application in the commercial speech context of the underinclusiveness analysis of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). *See, e.g., Valley Broad. Co. v. United States*, 107 F.3d 1328, 1331 (9th Cir. 1997); *MD II Entm't, Inc. v. Dallas*, 28 F.3d 492, 495 (5th Cir. 1994); *Holding v. Anchorage*, 63 P.3d 248 (Alaska 2003); *Rappa*, 18 F.3d at 1066 n.40.

Lower courts would also benefit from guidance in the proper treatment of less restrictive alternatives. Many cases upholding restrictions, like the decision below, rely heavily on the fact that the "least restrictive means" is not required. *See, e.g., Ass'n of Nat'l Advertisers v. Lungren*, 44 F.3d 726, 735 (9th Cir. 1994) (adopting "far-less-restrictive-means test). Other cases recognize that "in its most recent commercial speech decisions, the Supreme Court has placed renewed emphasis on the need for narrow tailoring," and thus invalidate restrictions that ignore less restrictive options. *Bad Frog Brewery*, 134 F.3d at 101; *see also, e.g., Revo v. Disciplinary Bd.*, 106 F.3d 929 (10th Cir. 1997). Confusion on this issue will only grow as lower courts navigate between the standing instruction that the "least restrictive alternative" is not required and the recent admonition that "if the Government could achieve its interests in a manner that . . . restricts less speech, the Government must do so." *Western States*, 535 U.S. at 371. The gap in these tests invites lower courts to pick and choose which standard to

apply – and the more permissive standard creates a strong disincentive for legislatures to investigate and implement non-speech restrictive alternatives.

Highlighting the difficult choices confronting lower courts, just days ago, one court rejected the national "do not call" registry on First Amendment grounds. *See Mainstream Marketing Services, Inc. v. F.T.C.*, No. 03 N 0184 (D. Colo. Sept. 25, 2003). In a decision adopting the strict approach to *Discovery Network* and its progeny like *Pearson*, and specifically relying on *R.A.V.*, *id.* at 23 n.3, and 26 n.4, the court held that because the registry only applies to commercial calls it "creates a burden on one type of speech based solely on its content" and does so "without a valid interest premised on content to justify its discrimination." *Id.* at 26-27. This holding is in direct conflict with the decision below, and illustrates the recurring nature of these questions and the need for guidance from this Court.

II. The Court Should Clarify The Applicability And Scope Of This Court's Decision In *Central Hudson*.

A. The *Central Hudson* Standard Is The Subject Of Recurring Criticism.

In *Central Hudson* this Court adopted an intermediate-scrutiny test for addressing First Amendment challenges to restrictions on commercial speech. In the years since *Central Hudson* was decided, however, considerable dissatisfaction has developed with the test announced by that decision. In *Greater New Orleans*, 527 U.S. at 184, for example, eight Justices noted that "certain judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech."

Similarly, in *44 Liquormart*, the Court unanimously invalidated the liquor advertising restrictions at issue, but was deeply divided over the proper scope of *Central Hudson*. Justices Stevens, Kennedy, and Ginsburg noted that

> when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

517 U.S. at 501 (plurality). Justice Thomas went further, explaining that there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial speech.'" *Id.* at 522-23 (concurring in the judgment). Justice Scalia "share[d] Justice Thomas's discomfort with the *Central Hudson* test," which he found "to have nothing more than policy intuition to support it." *Id.* at 517 (concurring in the judgment).

More recently, in *Lorillard*, the Court again recognized that "several Members of the Court have expressed doubts about the Central Hudson analysis and whether it should apply in particular cases." 533 U.S. at 553. Justice Kennedy, in a concurring opinion joined by Justice Scalia, noted his "continuing concerns that [*Central Hudson*] gives insufficient protection to truthful, nonmisleading commercial speech." *Id.* at 571-72 (concurring). Justice Thomas also noted his ongoing displeasure with *Central Hudson's* standard. *See id.* at 572 (concurring).

Other cases are to the same end. *See, e.g., Rubin*, 514 U.S. at 492 (Stevens, J., concurring in the judgment) (*Central Hudson* applies only where government seeks to "prohibit misleading speech that would be protected in other contexts" or to "requir[e] affirmative disclosures that the speaker might not make voluntarily"); *Discovery Network*, 507 U.S. at 433-34 and n.1 (1993) (Blackmun, J., concurring in the judgment) (intermediate scrutiny is appropriate only where commercial speech involves "false statements of fact" or "advocat[es] illegal activities").

Thus, over the last decade alone, six Justices – including a majority of the current Court – have indicated that *Central Hudson* does not or should not establish a test of

intermediate scrutiny that is generally applicable to all commercial speech restrictions.

B. Strict Scrutiny Should At Least Apply To Content-Based Restrictions Justified Only By Concerns Regarding The Means Of Distribution, A Question Left Open By *Discovery Network*.

Even to the extent that the *Central Hudson* standard remains appropriate in some contexts, it should have no application to a content-based regulation that is justified by the government's interest in restricting a particular *means* of communication. In *Discovery Network*, this Court recognized that "the principle reason for drawing a distinction between commercial and noncommercial speech has little, if any, application to a regulation of their distribution practices." *Discovery Network*, 507 U.S. at n.21. Indeed, the Court noted that strict scrutiny would "seem" to apply in such cases, although it ultimately did not need to resolve this issue:

> [I]f commercial speech is entitled to "lesser protection" only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech, not the more lenient standards by which we judge regulations on commercial speech. *Id.* at n.11.

These observations in *Discovery Network* reflect the consistent teaching of this Court's commercial speech cases. From its inception, the distinction between the protection afforded commercial and noncommercial speech has been linked to characteristics arising from commercial content. *See, e.g., Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24. Subsequent cases have continued to recognize that the ability to regulate commercial speech springs from the ability to regulate commercial transactions, which are "an area traditionally subject to government regulation." *Central*

Hudson, 447 U.S. at 562. It is in light of these principles, then, that *Discovery Network* recognized that where a regulation is concerned with restricting a particular *method* of communication, the unique concerns which justify lessened protection for commercial speech in some contexts are absent.

This understanding is also required by the general First Amendment principles articulated in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). In that case, the Court held that even categories of speech that are "unprotected" by the First Amendment (there, fighting words) cannot "be made the vehicles for content discrimination unrelated to their distinctively proscribable content." Fighting words, the Court explained, are excluded from First Amendment protection because they involve "a particularly intolerable . . . *mode* of expressing *whatever* idea the speaker wishes to convey." *Id.* at 393. But the ordinance at issue there, proscribing fighting words communicating racial, gender, or religious intolerance, did not single out "an especially offensive mode of expression, . . . for example, . . . fighting words that communicate ideas in a threatening . . . manner." *Id.* Instead, it made a content-based distinction that had nothing to do with the reason fighting words are unprotected, and the Court, accordingly, applied strict scrutiny.

If these principles apply to entirely unprotected categories of speech, then they also must apply to commercial speech, which plainly is a protected category. Here, because the rationales for affording reduced protection to commercial speech are inapplicable, the TCPA's fax restriction must be evaluated under general principles applicable to content-based regulations. Thus the TCPA's fax restriction could be sustained only if its discrimination against commercial speech were necessary to address a compelling interest, *see Simon & Schuster v. NY State Crime Victims Bd.*, 502 U.S. 105, 120 (1991), a standard the Act clearly cannot satisfy.

Accordingly, this case presents an excellent vehicle for clarifying the scope of *Central Hudson*, revisiting the issue

left open in *Discovery Network*, and applying the teachings of *R.A.V.* in this context.

III. The Constitutionality of the TCPA Is Of Great Public Importance And Deserves Review.

A. The TCPA's Fax Restrictions Have Generated A Wave Of Litigation.

To no one's surprise, commercial speakers are relying upon technological advances to advertise. This includes faxing, which many commercial speakers see as a vital means for communicating with customers, potential customers and businesses. Contrary to a common misperception, *see, e.g.,* Pet. App. 8a ("the junk fax advertiser . . . seizes your fax machine"), most commercial speakers utilize fax technology for commendable purposes. "There is a legitimate market for mass faxing. It helps pharmaceutical companies send drug information to doctors. Hotels and cruise lines use it to reach travel agents." Jeremiah Marquez, AP, *Unsolicited Faxed Ads Draw More Lawsuits*, Memphis Commercial Appeal, Sept. 7, 2003, at G1. Indeed, as the evidence before the trial court confirms, fax advertising is welcomed by many of its recipients. Office workers anticipate receiving menus and discount coupons from nearby restaurants. Restaurants depend on faxes from food wholesalers. And travelers enjoy the opportunity for inexpensive, last-minute vacations offered by hotel and tour operators.

Despite these benefits to businesses and consumers alike, the TCPA's undeniably broad reach has inspired a wave of lawsuits against commercial speakers. *See, e.g.,* William Glaberson, *Dispute Over Faxed Ads Draws Wide Scrutiny After $12 Million Award*, N.Y. Times, July 22, 2001, at 18. These suits are "filed against retailers that send fax advertisements directly to consumers" as well as "against marketing companies that retailers hire to send fax advertising." Glaberson, *Dispute Over Faxed Ads,* at 18. And they burden all types of commercial advertisers, from our nation's largest private employer, *see, e.g., Lipscomb v.*

Wal-Mart Stores, Inc., No. 01-CP-20-63 (Fairfield County, C.P. Ct., S.C.) (filed Oct. 8, 2001), to some of its smallest, *see Rudgayzer & Gratt v. Enine, Inc.*, No. 32527/01, at 7 (N.Y.C. Civil Court Sept. 30, 2002) ("the advertiser who hires Fax.com to send out ads by fax may be smaller than the business recipient complaining about the fax"), to some of its most well-known, *see* Ellena Morrison, *Lawsuits curb fax advertising*, Fort Worth Star Telegram, Dec. 5, 2001, at 7 ("the Dallas Cowboys agreed to pay $1.73 million in a class action" under the TCPA as "one of several recent high-dollar settlements").

One cannot overstate the consequences of these legal actions. Class actions lawsuits, whether brought by an individual or by an attorney general on behalf of the State's residents, dramatically change the stakes in TCPA litigation. For example, a plaintiff class suing under the TCPA in Georgia was awarded nearly $12 million in damages, including $4 million in attorney fees. *See Nicholson v. Hooters of Augusta, Inc.*, No. 95-RCCV-616 (Ga. Sup. Ct. Apr. 25, 2001). The $12 million in damages were awarded to 1,321 class members who each received six unsolicited fax advertisements. The company that made the mistake of sponsoring those six commercial faxes was forced into bankruptcy. *See In re Hooters of Augusta*, No. 1-01-6K-67611 (Bankr. N.D. Ga. filed June 8, 2001).

That company is not alone. "Faced with a large suit by the Texas attorney general filed under" the TCPA, one "in excess of $1 billion," American Blast Fax, a company that specialized in fax communication, has "close[d] its doors." Glaberson, *Dispute Over Faxed Ads,* at 18. Other commercial speakers, recognizing the devastating consequences a judgment could bring, have settled these suits, but not without significant payouts. *See, e.g., id.* (noting "a settlement of another class-action suit in which a North Charleston Ramada Inn paid $450,000" for sending faxes "advertising a New Year's Eve celebration"); Erin Suess, *Suits Over Unsolicited Faxes On The Rise*, St. Louis Daily Record, Aug. 10, 2002 ($6.5 million "settlement

between Illinois car dealership . . . and the recipients of faxes advertising the dealership"). If recent history is any guide, these lawsuits will continue for the foreseeable future. *See* Seuss, *Suits Over Unsolicited Faxes On The Rise.*

B. Today's Issue Will Evade Future Review.

While these cases have yet to generate a deep split of authority over the specific issue of the constitutionality of the TCPA's fax restrictions, *cf.* Sup. Ct. R. 10 (a), the Court would be ill-advised to wait for that issue to percolate in the lower courts. At the outset, a deep split in the federal circuits is exceedingly unlikely. Except for actions like this one brought by State attorney generals, the TCPA requires that cases be brought in state court, *see* 47 U.S.C. § 227(b)(3), meaning that few federal circuits will be asked to pass on the issues raised here. And as to the state courts, one can fairly expect that many of those courts will defer in practice to federal courts on issues of federal law. *See*, *e.g.*, *Lawson v. Reeves*, 537 So. 2d 15, 16-17 (Ala. 1988). This leaves the Eighth Circuit's underlying decision as the leading federal appellate authority on today's important federal question.

And even if the lower state and federal courts might entertain breaking with the Eighth Circuit's decision here, the chances to do so will be exceedingly rare. While the number of suits filed under the TCPA continues to grow seemingly without end, few if any will run the full course through the state or appellate courts and to the door of this Court. For individual plaintiffs that challenge the sending of one unauthorized fax, the plaintiff, should he prevail, is entitled to a maximum award of $1,500. One can fairly wonder how many defendants would pursue layers of appeals, and incur the associated legal fees, to challenge an award of this size on constitutional grounds.

The rest of the cases pursued under the TCPA are class actions. There too the likelihood of appeal is diminished by the amount of money at issue. In what may be the most notable example, a lawsuit was recently filed in California

against petitioner and its 10,000 advertisers demanding an astonishing $2.2 trillion in damages. *See Kirsch v. Fax.com. Inc.*, No. CV810516 (Santa Clara Cty., Cal. Super.) (filed Aug. 22, 2002); *"Lawsuits seek $2.2 Trillion over Faxes,"* (www.cnn.com/2002/LAW/08/23/junk.faxes.ap/index.html) (Aug. 23, 2002). The defendants in many of these cases risk multi-million-dollar judgments if they do not settle before trial, *see, e.g., Nicholson*, *supra* at 27, and when a large judgment is entered after a trial, few defendants will be able to post the bond necessary for an appeal. Thus, today's case presents one of the rare opportunities for the Court to address the important constitutional issues raised by the TCPA. Otherwise, those issues could remain unanswered for years to come, at least as a matter of this Court's jurisprudence.

Which, it bears noting, would be bad news for America's legitimate and truthful commercial speakers. Faced with the threat of lawsuits of this ilk, many businesses will do what many have already done – simply pull the plug on fax advertising altogether – effectively silencing an entire category of commercial speech. Today's constitutional question should be addressed now rather than later.

C. Fax Advertisers And Their Customers Are Not The Only Parties That Would Benefit From The Court Addressing Today's Question.

The writ should be granted in this case for one other important reason: the case has importance far beyond fax advertising. Just as technology continues to offer innovative avenues to commercial speakers, legislatures are equally quick to keep commercial speakers from utilizing those technologies. In the 108th Congress, for example, no fewer than nine separate bills were introduced limiting commercial speech by e-mail, with at least one calling for a nationwide ban on the use of telecommunications devices to solicit business.[10] The same is true at the state level, where new

[10] *See* Anti-Spam Act of 2003 (H.R. 2515); Ban on Deceptive Unsolicited Bulk Electronic Mail Act of 2003 (S. 1052); CAN-SPAM Act of 2003 (S. 877); Computer Owner's Bill of Rights (S. 563);

legislative restrictions on commercial speech have already taken hold. *See, e.g.*, Cal. Bus. & Prof. Code §17529.2(a), (b) (banning all unsolicited commercial email); Va. Code §18.2-152.3:1 (felony anti-spam statute). Just days ago, California enacted "the most wide reaching law of any of the 35 other state laws meant to regulate spam." *See California Is Set to Ban Spam*, New York Times (Sept. 24, 2003). As the act's sponsor explained, "[w]e are saying that unsolicited email cannot be sent and there are no loopholes." *Id.* The act's "proponents" note that "[a] similar provision is credited with helping to ensure compliance with the federal law against unsolicited faxes." *Id.* It is thus unsurprising that many commentators see these legislative acts as well as the TCPA as "part of a growing effort to curtail many types of advertising, including telemarketing and mass e-mail advertising." Glaberson, *Dispute Over Faxed Ads*, at 18.

While the questions over excluding advertisers from entire channels of communication will only grow in importance, today's and tomorrow's far-ranging legislative restrictions on commercial speech lamentably are enacted without the benefit of clear guidance. Today's case squarely presents the chance to establish the standard of protection benefiting commercial speech generally, and technology-driven speech specifically. A decision in this case will provide legislatures with a roadmap for answering these recurring questions surrounding emerging communication technologies.

CONCLUSION

The petition should be granted.

Criminal Spam Act of 2003 (S. 1293); REDUCE SPAM Act of 2003 (H.R. 1993); Reduction in Distribution of Spam Act of 2003 (H.R. 2214); Stop Pornography and Abusive Marketing Act (S. 1231); Wireless Telephone Spam Protection Act (H.R. 122).

October 2003

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